(12)

No. 91-1010

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

Petitioner,

v.

METCALF & EDDY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondent has all but abandoned the First Circuit's holding that there is no right of immediate appeal from a district court's order denying a claim of Eleventh Amendment immunity from suit in federal court. Respondent's brief advances only one argument in support of the court of appeals' judgment. That argument, however, is inconsistent with the Eleventh Amendment and established doctrine. The bulk of Respondent's brief is an attempt to persuade this Court to reject Petitioner's claim of Eleventh Amendment immunity on its merits. The sole issue before this Court, however, is the jurisdictional question whether orders denying claims to such immunity are immediately appealable. Respondent's arguments against the merits of Petitioner's claim to immunity are not properly before this Court.

ARGUMENT

I.
INTERLOCUTORY ORDERS DENYING CLAIMS TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT ARE IMMEDIATELY APPEALABLE

Our opening brief demonstrated that the sovereign immunity recognized by the Eleventh Amendment is an immunity from being subject to the jurisdiction of the federal district courts, not simply an immunity from the imposition of damages after a trial. Pet. Br. at 8-15, 17-20. Orders denying such immunity must be immediately appealable, because the right not to be sued would be lost irrevocably by delaying an appeal until the completion of trial court proceedings. *Id.* at 17-24. While acknowledging that an immediate appeal would be available *if* Eleventh Amendment immunity includes the right not to be sued, Respondent contends that the Eleventh Amendment lacks "an explicit guarantee against trial" and that the "core interest" of the Amendment only protects the States against monetary judgments. Resp. Br. at 12-18. Both contentions are erroneous.

Respondent's "explicit guarantee" argument contradicts the text of the Eleventh Amendment. Pet. Br. at 12-13. As we explained in our opening brief, the Amendment provides a rule of construction for the term "judicial power" in Article III of the Constitution. The Amendment provides that the federal judicial power "shall not be construed to extend to any suit . . . commenced or prosecuted" against a State by citizens of other States or foreign nations. The right guaranteed to the States by the Amendment is the right of governmental sovereigns not to be subject to judicial authority from the "commence[ment]" of suit through the "prosecut[ion]" of suit to trial and judgment.

Any narrower reading of the Eleventh Amendment would be inconsistent with the broad purpose of the

Amendment: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers,* 123 U.S. 443, 505 (1887). The Amendment recognizes a bar to district court authority not just to enter monetary judgments, but to conduct the entire range of pretrial and trial proceedings — particularly, as an historical and textual matter, in diversity suits like this one. See Pet. Br. at 9.[1]

Respondent's attempt to limit sovereign immunity to a "core interest" in avoiding monetary judgments similarly contradicts the text of the Eleventh Amendment, which contains no such limitation. This "core interest," which Respondent finds enunciated "forcefully" in decisions of this Court, Resp. Br. at 14, in fact contradicts decisions of this Court. This Court has made clear that a suit against a State or its departments is barred even where no monetary relief is sought. *Alabama v. Pugh,* 438 U.S. 781, 782 (1978) (per curiam). Indeed, this Court has expressly rejected an attempt to limit the immunity to monetary liability:

> It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to

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1. In addition to ignoring the language of and the policy animating the Eleventh Amendment, Respondent's "core interest" argument is mistaken for at least two reasons. First, Respondent is obviously wrong to assert that immediate appealability requires an explicit textual right not to stand trial. Resp. Br. at 12. As Respondent itself recognized, *id.* at 17, denials of official immunity are immediately appealable even though there is no textual right to such immunity. *See Nixon v. Fitzgerald,* 457 U.S. 731, 745 (1982). Second, with respect to the immunity at issue in this case, this Court has long recognized that the principle of sovereign immunity is reflected in, but is not limited by, the text of the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984); *Hans v. Louisiana,* 134 U.S. 1, 12 (1890). This principle of sovereign immunity protects against the "indignity" of the federal district courts' exercise of their power over sovereigns at the instance of private parties.

> enjoin the State itself simply because no money judgment is sought. . . . To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

Cory v. White, 457 U.S. 85, 90-91 (1982).

Respondent finally raises the specter of excessive burdens on the courts and delays in litigation if district court orders denying claims of sovereign immunity are held to be immediately appealable. Resp. Br. at 17. Respondent's vision of a flood of frivolous appeals is utterly implausible. There is no indication that frivolous appeals have clogged the dockets of any of the eight circuits that allow such appeals.[2] Moreover, the number of sovereign immunity appeals could not conceivably compare to the number of official immunity or double jeopardy appeals – both of which may be taken on an interlocutory basis. *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Abney v. United States,* 431 U.S. 651 (1977).[3] As this Court expressly noted in *Abney*, the lower courts have adequate means to weed out and deter frivolous, dilatory appeals, including the use of expedited procedures and sanctions. 431 U.S. at 662 n.8.

Respondent's unwarranted fears do not justify sacrificing the important right of State sovereign immunity – an essential element of the constitutional balance of

2. In addition to the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, *see* Pet. Br. at 19 n.17, the Eighth and Ninth Circuits have recently held that denials of sovereign immunity claims are immediately appealable. *See Barnes v. Missouri,* 960 F.2d 63 (8th Cir. 1992); *Durning v. Citibank, N.A.,* 950 F.2d 1419 (9th Cir. 1991).

3. Indeed, it is hard to imagine what large class of appeals Respondent has in mind. A sovereign immunity claim by a government entity like Petitioner typically will be litigated only once.

authority within the federal system. In short, no pragmatic reasons exist to deny States the means to vindicate their structural right not to be sued by private parties in federal court.

II.
RESPONDENT'S ARGUMENTS THAT FAIL TO ADDRESS THE QUESTION UPON WHICH CERTIORARI WAS GRANTED SHOULD BE REJECTED BY THIS COURT

Respondent makes three additional contentions in its brief: that Petitioner waived its claim of immunity, Resp. Br. at 18-21; that "public corporations" like Petitioner have no right to Eleventh Amendment immunity, *id.*; and that Puerto Rico is not entitled to sovereign immunity from suit, *id.* at 24-30. These three arguments should be rejected because they are not addressed to the question presented and because each lacks merit.

A. Respondent's Three Arguments on the Merits Are Not Properly Before this Court

Respondent's three contentions are nothing but arguments against the merits of Petitioner's claim to sovereign immunity – a matter that the court of appeals did not review, that is not within the scope of the sole question presented in this Court, and that was not raised by any cross-petition.[4] These arguments, therefore, are not properly before this Court. As Respondent itself acknowledges, "any issues other than appealability must be remanded to the First Circuit for resolution." *Id.* at 23 n.14.

4. Respondent's argument with respect to public corporations is phrased as if it addresses the question of appealability, but the assertion that "public corporations" are not fully entitled to sovereign immunity challenges the merits of Petitioner's entitlement to immunity. The assertion is irrevelant to the question whether a district court's denial of *any entity's* claim to such immunity is immediately appealable.

Respondent cannot escape this problem by appealing to the principle that allows defense of a judgment below on alternative grounds. To advance arguments that are not part of the question presented in this Court, it is necessary (although not sufficient) that each argument support the judgment of the court below and neither add to nor modify it. *See, e.g., Thigpen v. Roberts,* 468 U.S. 27, 30 (1984); *Federal Energy Admin. v. Algonquin SNG, Inc.,* 426 U.S. 548, 560 n.11 (1976). If accepted, the arguments raised by Respondent would affirm the district court order rejecting Petitioner's individual claim of immunity. The judgment of the court of appeals, however, was a dismissal for lack of jurisdiction that did not address the merits of Petitioner's claim to immunity from suit. Pet. App. at A-8. Respondent's challenges to Petitioner's claim to Eleventh Amendment immunity are not arguments for the lack of immediate appellate jurisdiction to review such a claim.[5] Because these arguments support a judgment different from the court of appeals' judgment dismissing the appeal for lack of jurisdiction, they are not properly presented on review of the First Circuit's judgment.

5. *See Carroll v. United States,* 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case."); *Hagans v. Lavine,* 415 U.S. 528, 542 (1974) (distinguishing dismissal for lack of jurisdiction from dismissal because claim lacks merit); *Bell v. Hood,* 327 U.S. 678, 682 (1946).

As in *Hagans* and *Bell,* even if the claim is meritless, this case does not involve a claim that is "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit" as to defeat the basis of jurisdiction. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666-67 (1974), *quoted in Hagans,* 415 U.S. at 543. In fact, the district court, which rejected the claim of immunity, nevertheless denied Respondent's motion to impose sanctions against petitioner, stating the "sanctions should not be imposed for raising serious challenges" to the court's jurisdiction. Pet. App. at A-9.

B. Each of Respondent's Three Arguments Is Meritless

In any event, Respondent's three arguments on the merits are an insufficient basis for this Court to do anything but reverse and remand the case for consideration of the Petitioner's Eleventh Amendment claim on the merits. Without fully briefing these arguments, we address each in turn.

Respondent's waiver argument is meritless. If, as this Court has held, a claim of Eleventh Amendment immunity is not waived by failure to raise it in the trial court at all, *Edelman v. Jordan,* 415 U.S. 651, 678 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-67 (1945), neither can such a claim be waived by "moving to dismiss for failure to join an indispensable party *before* moving to dismiss on Eleventh Amendment grounds." Resp. Br. at 19 (footnote omitted). Moreover, Respondent has not argued previously that Petitioner waived its Eleventh Amendment claim. To the contrary, in opposing certiorari, Respondent conceded that "[Petitioner] has not waived whatever Eleventh Amendment defense it may have." Opp. Br. at 12 (footnote omitted). *See also* Br. of Appellee in Support of Motion to Dismiss Appeal at 14, 17 ("[T]here can be no suggestion . . . that [Petitioner] does not wish to pursue this defense or that it has knowingly and voluntarily waived it.").

Similarly, Respondent failed to raise in the courts below the argument that public corporations do not share States' sovereign immunity from suit. In the court of appeals, Respondent nowhere argued for a blanket rule holding that "public corporations" cannot be "arms of the State" for purposes of sovereign immunity from suit. Instead, Respondent advanced a case-specific argument that Petitioner was not entitled to the immunity because of certain of its individual characteristics, not because of Petitioner's general status as a public corporation. Br. of Appellee at 17; Opp. to PRASA's Motion for Reconsideration (Mar. 15, 1991) at 4-5. Respondent's

approach in the court of appeals surely is correct: no reason exists why sovereign immunity should be unavailable to a public corporation simply because of its form of organization. Mere forms and labels – particularly where their meaning and significance is derived from a legal tradition as unique as Puerto Rico's – cannot control whether a governmental entity is an arm of the State. Case-by-case inquiry is needed to resolve the question, as the First Circuit itself has recognized in affording Eleventh Amendment immunity to other Puerto Rican public corporations on an individual basis. *See* Pet. Br. at 2-3.[6]

Finally, Respondent's claim that Puerto Rico is not entitled to sovereign immunity from suit was not raised in the court of appeals. That is hardly surprising because the question has long been settled in the First Circuit, as the court below recognized. *See* Pet. App. at A-3 n.1. This Court, too, has repeatedly recognized that Puerto Rico enjoys the sovereign immunity from suit enjoyed by the States of the Union. *See, e.g., Sancho v. Yabucoa Sugar Co.,* 306 U.S. 505, 506 (1939) ("[T]his suit cannot be maintained unless authorized by Porto Rican law, because Porto Rico cannot be sued without its consent."); *Puerto Rico v. Shell Co.,* 302 U.S. 253, 262 (1937) (statute conferred "upon the territory many of the attributes of quasi sovereignty possessed by the states – as, for example, immunity from suit without their consent."); *Porto Rico v. Rosaly y Castillo,* 227 U.S. 270, 273 (1913) (absent exception, "Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being

6. This Court has addressed the merits of Eleventh Amendment immunity claims made by public corporations without suggesting that the claimant's identity as a public corporation automatically precluded such a claim. *See, e.g., Port Auth. Trans-Hudson Corp. v. Feeney,* 495 U.S. 299 (1990); *Petty v. Tennessee-Missouri Bridge Comm.,* 359 U.S. 275 (1959).

sued without its consent.").[7] The conclusion that Puerto Rico enjoys sovereign immunity from suit is in no way undermined by the Eleventh Amendment's reference to "one of the United States." This Court has long recognized that the Congress intended "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 594 (1976) (quoting *Calero-Toledo,* 416 U.S. at 671). And this Court has also long recognized that the principle of state sovereign immunity is broader than – is reflected in, but not limited by – the Eleventh Amendment. *Pennhurst,* 465 U.S. at 98; *Hans,* 134 U.S. at 10. That inherent constitutional principle fully applies to Puerto Rico as a sovereign entity.[8]

7. *See also Posadas de P.R. Assoc. v. Tourism Co.,* 478 U.S. 328, 339 (1986); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 673 (1974) (because Puerto Rico is "sovereign over matters not ruled by the Constitution," it is "State" for purposes of 28 U.S.C. § 2281 (1970)) (citation omitted).

8. It would be particularly inappropriate for this Court to revisit this question in a case where the Attorney General of Puerto Rico has not appeared. The Attorney General's absence reflects nothing more than the fact, hardly unique to Petitioner, that statutory authority exists for private counsel to represent this arm of the Commonwealth.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for consideration of the sovereign immunity question on its merits.

Respectfully submitted,

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